90-461

No. 89-

In The

Supreme Court of the United States

OCTOBER TERM, 1989

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

LANI MOORE, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the Handicapped Children's Protection Act, unlike every other civil rights act, permits a party who prevails in an administrative proceeding to bring a civil action solely for the purpose of securing attorneys' fees.

PARTIES

In the court of appeals, the parties were: (1) the District of Columbia and Dr. Andrew E. Jenkins III, Superintendent, D.C. Public Schools, petitioners here; and (2) Lani Moore, Dwight and Anita Moore, Morgan Fishman, Charles and Margaret Fishman, Jennifer Daley-Hynes, Hillary and Kathy Daley-Hynes, Kelly Rastatter, Edmund and Clem Rastatter, Robert White, Lois White, Anika Cox, Courtland and Frankie Cox, Peter Cook, Stephen Cook, Michael Holmes, Gerald Holmes, Tacuma Akwiah Hampton-Day and Demetra Hampton, respondents here.

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The District of Columbia and Andrew E. Jenkins III, Superintendent of the District of Columbia Public Schools, petition this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The June 19, 1990, decision of the United States Court of Appeals for the District of Columbia Circuit sitting *en banc* is reported at 907 F.2d 165. App. 1a-24a. The June 20, 1989, decision of a three-judge panel of that court is reported at 886 F.2d 335. App. 25a-67a. The August 24, 1989, order granting *en banc* review (App. 76a) is not reported.

The relevant opinion of the United States District Court for the District of Columbia was issued on July 27, 1987, and is reported at 666 F. Supp. 263. App. 68a-74a.[1]

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[1] This is the opinion ruling that petitioners are liable for attorneys' fees. The district court's opinion of November 30, 1987, assessing the amount
[Footnote continued on next page]

JURISDICTION

The judgment of the Court of Appeals sitting *en banc* was entered on June 19, 1990. App. 77a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant text of 20 U.S.C. § 1415 is reproduced in the appendix to this petition. App. 78a-82a.

STATEMENT OF THE CASE

I. INTRODUCTION.

In 1975, Congress enacted the Education of the Handicapped Act ("EHA"), Pub. L. 94-142, 20 U.S.C. § 1400 *et seq.*, to ensure that handicapped children are provided a free appropriate public education. In 1984, this Court ruled that the EHA did not permit an award of attorneys' fees to parents who prevail in litigation to enforce the educational rights it created. *See Smith v. Robinson*, 468 U.S. 992 (1984). This Court also ruled that neither the Rehabilitation Act of 1973, 29 U.S.C. § 794(b), nor 42 U.S.C. § 1988 permitted an award of fees in cases seeking to enforce guarantees that are also encompassed by the EHA's comprehensive scheme. Two years later, Congress overturned *Smith v. Robinson* when it enacted the Handicapped Children's Protection Act of 1986 ("HCPA"), Pub. L. 99-372, 100 Stat. 796-98 (1986), 20 U.S.C. § 1415(e)(4)(B) *et seq.*

This case presents the question whether the HCPA authorizes parents who prevail in EHA administrative proceedings to bring a unique civil action solely to recover

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[Footnote continued from previous page]
of fees, is reported at 674 F. Supp. 901. This opinion is not included in the appendix because this aspect of the appeal is still pending in the court of appeals and because petitioners have no intention of seeking review of that matter in this Court. On the distinct issue of fee liability, the court of appeals entered a separate judgment dated June 19, 1990. App. 77a.

attorneys' fees. A divided panel of the District of Columbia Circuit, in an exhaustive and painstaking opinion, held that it does not. The court sitting *en banc* disagreed.

We submit that the panel decision, rejecting an unprecedented exception to the American Rule governing attorney-fee awards, is correct. The language of the EHA, as amended by the HCPA, authorizes fees only for parents who must resort to the courts to vindicate their child's educational rights. The legislative history does not clearly indicate that Congress meant something different from the language it enacted, as would be required to set aside the plain meaning of the statute. What the legislative history does show is that Congress intended that fees be awarded under the HCPA in the same circumstances that they are awarded to other civil rights litigants. The *en banc* court has confounded that intent by creating under the HCPA a right to fees that does not exist under any other fee-shifting statute.

II. THE STATUTORY SCHEME.

The EHA requires state and local governments, which accept federal educational funds, to identify handicapped children within their jurisdiction and to develop for each of them an individualized educational program ("IEP"). If a parent objects to the IEP (or to any aspect of his or her child's educational program), the EHA requires a due process hearing before an impartial administrative agency. A decision in that forum may also be subject to state-level administrative review.[2] Any party aggrieved by a final administrative decision, whether a parent or a school system, may seek judicial review in the local or the federal courts.

Prior to its amendment in 1986, § 1415 of the EHA contained five subsections, including subsection (b), requiring IEPs and due process hearings; subsection (c), providing for state-level review of due process hearings; and subsection (e),

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[2] In the District of Columbia, only a due process hearing is available.

providing for civil actions. Subsection (e), in turn, was subdivided into several paragraphs: (e)(1), declaring that decisions in due process hearings and state-level review proceedings are final with certain specified exceptions; (e)(2), permitting judicial review of final, administrative decisions at the behest of a party aggrieved; (e)(3), barring school systems from unilaterally altering a child's educational placement pending completion of the "proceedings" established in § 1415; and (e)(4), conferring jurisdiction on courts "of actions brought *under this subsection* . . .." (Emphasis added). More particularly, paragraph (2) of subsection 1415(e) provided in pertinent part:

> *Any party aggrieved by the findings and decision* made under subsection (b) of this section who does not have the right to appeal under subsection (c) of this section, and *any party aggrieved by the findings and decision* under subsection (c) of this section, *shall have the right to bring a civil action* with respect to the complaint presented pursuant to this section, which action may be brought . . . in a district court of the United States without regard to the amount in controversy . . ..

(Emphasis added).

These provisions remained unchanged when the EHA was amended by the HCPA, although § 1415(e)(4), the jurisdictional provision, was renumbered as § 1415(e)(4)(A). Insofar as is relevant here, what Congress did in 1986 was to add, after the renumbered jurisdictional provision, a fee-shifting provision; an offer-of-settlement provision; and a provision stating that the EHA, as amended, is not exclusive.

The fee-shifting provision, § 1415(e)(4)(B), states:

> In any action or proceeding *brought under this subsection, the court*, in its discretion, *may award reasonable attorneys' fees* as part of the costs to the parents . . . of a handicapped child . . . who is the prevailing party.

(Emphasis added).

In the offer-of-settlement provision, § 1415(e)(4)(D), Congress directed that parents be denied fees otherwise award-

able for services performed after they reject a timely settlement offer if a "court or administrative officer finds that the relief finally obtained by the parents . . . is not more favorable . . . than the offer of settlement."

Finally, in a new subsection, § 1415(f), Congress expressly preserved for handicapped children all rights and remedies conferred by other laws, such as 42 U.S.C. §§ 1983 & 1988. It directed, however, "that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section [due process hearings and state-level administrative review] shall be exhausted to the same extent as would be required had the action been brought under this subchapter."

III. PERTINENT PROCEEDINGS IN THE COURTS BELOW.

A. The District Court.

This suit was brought in the United States District Court for the District of Columbia by several handicapped children and their parents who prevailed in EHA due process hearings. It was brought not for the purpose of securing any educational benefits but solely for the purpose of seeking reimbursement from the District of Columbia for attorneys' fees they incurred in the due process hearings. Jurisdiction was invoked under 20 U.S.C. § 1415(e)(4)(A).

The district court, Judge Stanley Sporkin, ruled that fee awards may be made not only to parents who must go to court to secure the educational rights guaranteed by the EHA and who prevail in that forum, but also to parents who prevail in a due process hearing and need not go to court. In the latter instance, Judge Sporkin ruled, the HCPA authorizes parents to sue solely for the purpose of securing attorneys' fees incurred in a due process hearing.

B. The Panel Opinion in the Court of Appeals.

A panel of the court of appeals reversed in a two-to-one decision. Judge Daniel M. Friedman of the Federal Circuit,

sitting by designation, wrote the majority opinion in which Judge Stephen F. Williams joined; Judge Harry T. Edwards dissented. The majority ruled that parents who prevail in an EHA due process hearing, and thus are not aggrieved, may not bring a suit solely for the purpose of securing attorneys' fees.

Judge Friedman's opinion constituted the first exhaustive judicial analysis of the HCPA's statutory language and its legislative history. The principal points of his analysis are as follows.

1. The statutory language.

Judge Friedman began by construing the words of the fee shifting provision — " '[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees . . . to the parents . . . of a handicapped child . . . who is the prevailing party.' " App. 29a, quoting § 1415(e)(4)(B). According to Judge Friedman, "[t]he reference to 'brought under this subsection' is to subsection (e), which is one of six subsections of section 1415." App. 29a-30a. When Congress wished to refer to other provisions of the statute, it did so by using different terms. See App. 30a, citing § 1415(e)(2) ("complaint presented pursuant to this section"); § 1415(e)(3) ("[d]uring the pendency of any proceedings conducted pursuant to this section"). Here, "[t]he only reference in subsection 1415(e) to the bringing of actions or proceedings is the statement in § 1415(e)(2) that '[a]ny party aggrieved by the findings and decision' " made in administrative proceedings pursuant to subsections (b)(2) or (c) " 'shall have the right to bring a civil action . . . .' " App. 30a. As a consequence, the EHA, even as amended, permits only a party aggrieved by a decision at the administrative level to bring a court action.

In so ruling, Judge Friedman also concluded:

a. Parents who prevail at the administrative level do not become prevailing parties for the purpose of the fee-

shifting provision. That provision, § 1415(e)(4)(B), refers only to a " 'prevailing party' " in an " 'action or proceeding brought under this subsection,' " that is, subsection (e). App. 32a. Due process hearings and state-level administrative review of those hearings are brought pursuant to subsections (b)(2) and (c) of § 1415. App. 30a-33a.

b. The mere use of the term "proceeding" in the fee-shifting provision does not itself permit an action for fees alone. The use of the qualifier, "brought under this subsection," precludes such a broad construction of the term "proceeding." App. 32a.

c. The offer-of-settlement provision, which bars an award of fees in certain circumstances — when a parent rejects a settlement offer that turns out to be at least as favorable as the relief finally obtained — "does not authorize the award of attorney fees for administrative proceedings." App. 34a. Instead, this provision merely denies an award of fees in civil actions in which they would otherwise be available under § 1415(e)(4)(B), *i.e.*, in a court case on the merits in which a parent prevails. App. 34a.

2. This Court's fee decisions.

In support of the panel's ruling, Judge Friedman also analyzed *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), and *North Carolina Dept. of Transp. v. Crest Street Community Council, Inc.*, 479 U.S. 6 (1986). He concluded:

a. *Carey* states that an action for fees alone may be brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), pursuant to the "action or proceeding" language of Title VII. App. 34a-35a. However, as Justice Stevens expressly noted in *Carey*, that statement is *obiter dictum* because " '[w]hether Congress intended to authorize a separate federal action solely to recover costs, including attorney's fees, incurred in obtaining administrative relief . . . is not only doubtful but is a question that is plainly not presented by this record.' " App. 36a, *quoting Carey*, *supra*, 447 U.S. at 71 (Stevens, J., concurring).

b. *Crest Street* holds that 42 U.S.C. § 1988 does not permit an action solely to recover fees incurred in an administrative proceeding to enforce one's civil rights even though § 1988 provides that fees may be awarded "[i]n any action or proceeding to enforce" enumerated civil right laws. In *Crest Street*, moreover, a majority of this Court expressly disavowed the *Carey dictum*. App. 36a-38a.

3. The legislative history.

In analyzing the legislative history, Judge Friedman began by acknowledging that "[t]he 'plain language' of § 1415(e)(4)(B) 'controls its construction, at least in the absence of clear evidence, of a clearly expressed legislative intention to the contrary.' " App. 39a, *quoting, inter alia, Bread Political Action Comm'n v. FEC*, 455 U.S. 577, 581 (1982). He then engaged in an extensive analysis of the legislative history (App. 39a-56a) and concluded:

a. The House intended to authorize an action for fees alone and used the phrase "action or proceeding" in the fee-shifting provision to achieve that purpose. App. 54a.[3]

b. The Senate did not clearly intend to authorize an independent fee action.

(i) The Senate Report is ambiguous. App. 55a. The report states that the legislation is intended to permit fee awards " 'on a basis similar to other fee shifting statutes.' " App. 42a-43a, *quoting* S. Rep. No. 99-112, 99th Cong., 1st Sess. 14, reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1804 (1985). The report also states that the legislation should be interpreted like Title VII; refers to *Carey*; and compares *Carey* to *Webb v. Dyer County Board of Education*, 471 U.S. 234 (1985), in which this Court denied fees for

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[3] The 1985 House Report stated that this language was intended to authorize an independent fee action; and this interpretation was confirmed by the House floor manager, Representative Williams, in 1985. See App. 48a-49a, 50a.

work done in administrative proceedings. However, neither case "involve[d] a suit brought solely to obtain fees for work done in . . . administrative proceedings." App. 55a-56a. As a consequence, the Senate Report "may have been suggesting only that parents who prevail in an EHA judicial action also will be awarded fees for work done at the administrative level." App. 56a.

(ii) The floor debates in the Senate do not clearly establish an intent to authorize an action for fees alone. In these debates in 1985 and 1986, the *Carey dictum* and an independent fee action were mentioned only once. App. 55a. In 1985, Senator Simon cited the *Carey dictum* and stated that, under its reasoning, the HCPA should be construed as authorizing an independent fee action. App. 45a-46a, 55a. The other Senators who addressed the measure in 1985 and 1986, as well as Senator Simon in 1986, urged that it was needed to ensure fees when parents must go to court to secure their child's educational rights. App. 43a-45a, 52a-53a.

(iii) The conference committee report, issued just before the 1986 floor debates, is ambiguous. App. 56a. Both the Senate and House bills contained the "action or proceeding" language. However, the House, but not the Senate, bill contained a "sunset" provision which the conference report described as "terminating 'the court's authority to award fees at the administrative level' " after a four-year period. App. 56a. At the conference, the "sunset" provision was rejected. That action, however, "does not establish that the conferees believed the bill they recommended" authorized an independent fee action. App. 56a. Thus, one "plausible explanation . . . [for rejecting the "sunset" provision] is that the Senate conferees did not believe the conference bill contained that authority, so that there was no reason to terminate it after that time." App. 56a.

In short, because there was no clear evidence of a clearly expressed intention in both Houses of Congress to create an independent fee action, the plain language of the EHA, as amended by the HCPA, was controlling.

C. The *En Banc* Opinion in the Court of Appeals.

The court of appeals, sitting *en banc*, declined to follow the reasoning of Judge Friedman's opinion. In his opinion for the *en banc* court, Judge Edwards took an approach that superficially paralleled that taken by Judge Friedman but was, in fact, radically different.

1. The statutory language.

In construing the statutory language, Judge Edwards concluded:

a. The phrase "action or proceeding" in the fee-shifting provision must be examined in isolation. App. 6a. When that is done, the court was "at a loss to give meaning to the distinction between 'action' and 'proceeding' short of inferring that Congress meant to authorize fees for parents who prevail either in a *civil action* or in an *administrative proceeding* under EHA." App. 6a (emphasis supplied by court).

b. Elsewhere in the EHA and the HCPA, Congress used the "identical" terms to "distinguish between the administrative and judicial phases of EHA litigation." App. 6a. Thus, in § 1415(e)(2), the EHA authorizes a " 'civil action' " in courts and requires that " 'in any *action* . . . the court shall receive the records of the administrative *proceedings* . . . .' " App. 6a (emphasis supplied by court).

c. The "contemporaneous judicial construction of the phrase 'action or proceeding' " in the *Carey dictum* supports construing the identical phrase in the HCPA as authorizing an independent fee action. App. 7a. *Crest Street* is not relevant because it was decided after the HCPA was enacted. App. 8a-9a.

d. The offer-of-settlement provision would not make sense in the absence of an independent fee action. For example, even though the HCPA does not define when an administrative officer is to compare the relief a parent finally obtains with a settlement offer, the provision must be read

to permit this comparative assessment "only in the event that the parent achieves 'final[ ]' relief in an administrative proceeding . . . ." App. 10a. As a consequence, the "HCPA clearly contemplates that the issue of attorney fees will survive an otherwise successful outcome for the parent at the administrative stage." App. 10a.

e. The qualifier, "brought under this subsection," in the fee-shifting provision does not mean that parents may secure fees only if they prevail in a civil action on the merits. App. 12a-14a. Instead, a suit to recover fees may be brought "*directly* under section 1415(e)(4)," and such an action "is as much a suit 'under' subsection 1415(e) as is a suit challenging an adverse administrative determination under section 1415(e)(2)." App. 13a (emphasis supplied by court). Furthermore, Congress plainly erred in enacting the term "subsection" in the fee-shifting provision, as well as in the non-exclusivity provision. App. 14a.

2. The legislative history.

Judge Edwards also analyzed the legislative history. However, he concluded that the Senate intended to authorize an independent fee action.

a. The reference to *Carey* in the Senate Report supports an independent fee action because *Carey* "unambiguously concluded *both* that [Title VII] . . . authorizes recovery of fees incurred in necessary administrative proceedings *and* that a party who prevails at that level can sue for fees." App. 17a (emphasis supplied by court).

b. In the Senate debates, only Senator Simon addressed the precise issue of an independent fee action and he advocated adoption of the *Carey dictum*. App. 18a. The repeated statements of Senator Weicker, the architect of the HCPA, and of other Senators, that the bill was intended to provide fees to parents who must go to court to secure their child's educational rights merely illustrate one application of the HCPA. App. 20a-21a. Because not one Senator took issue with the 1985 Senate Report's reference to *Carey* or

with Senator Simon's adoption of the *Carey dictum* in 1985, the view expressed by that report (as construed by the court) and by Senator Simon should be accepted "as the one adopted by the full Senate." App. 21a.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The court of appeals has sharply departed from this Court's decision in *Crest Street*. Contrary to *Crest Street*, it has held that, when a federal fee-shifting statute contains the phrase, "action or proceeding," that language authorizes a civil action solely for the purpose of securing attorneys' fees incurred in an administrative proceeding. Its ruling in this case permits parents of a handicapped child to seek fees whenever an administrative officer determines that a school district has failed to comply with the EHA in some respect and thus treats these persons far more favorably than, for example, victims of intentional racial or gender-based discrimination. This ruling cannot be squared with the language of the HCPA or with the legislative history in the Senate. Furthermore, there is no evidence that either House of Congress wanted to authorize fee awards in circumstances not permitted by other fee-shifting statutes.

Review of the *en banc* opinion is necessary for several reasons. The court of appeals has decided a legal issue of nationwide significance that should be decided by this Court. Furthermore, as demonstrated by Judge Friedman's opinion, that court's analysis of the HCPA's language and legislative history squarely conflicts with this Court's decision in *Crest Street* and is wrong. The HCPA, like other fee-shifting statutes, authorizes an attorney-fee award for administrative proceedings only in a civil action in which the substantive or procedural rights conferred by law are at issue.

I. THE *EN BANC* COURT'S INTERPRETATION OF THE PHRASE "ACTION OR PROCEEDING" SQUARELY CONFLICTS WITH *CREST STREET* AND IS WRONG.

In *Crest Street*, this Court ruled that 42 U.S.C. § 1988 does not permit an action solely to recover attorneys' fees incurred by a party who enforces his civil rights in an administrative proceeding even though § 1988 permits a fee award "[i]n any action or proceeding to enforce" specified civil rights laws.[4] In *Crest Street*, this Court held that attorneys' fees may not be awarded under § 1988 in "a court action *other than* litigation in which a party seeks to enforce the civil rights laws listed in § 1988." 479 U.S. at 12 (emphasis in original).

Crest Street cannot be distinguished from this case on the grounds that § 1988, unlike § 1415(e)(4)(B), contains the phrase "to enforce." The "to enforce" language was not critical in *Crest Street*, and the case would have been decided in the same way had § 1988 permitted a fee award in "any action or proceeding brought under" specified civil rights laws. Alternatively, the HCPA contains language that is the functional equivalent of the "to enforce" language of § 1988. The HCPA permits fee awards only in "any action or proceeding brought *under this subsection*" — *i.e.*, only in a case brought by a party aggrieved by an administrative decision. § 1415(e)(4)(B) (emphasis added). As this Court explained in *Crest Steet*, the language of § 1988 is "identical" to that of Title VII, construed in *Carey*, even though Title VII, which permits a fee award "[i]n any action or proceeding under" that provision, does not contain any "to enforce" language. *Crest Street*, *supra*, 479 U.S. at 15. Even the *Crest Street*

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[4] However, "[a] court hearing one of the civil rights claims covered by § 1988 may still award attorney's fees for time spent on administrative proceedings to enforce the civil rights claim prior to the litigation." *Id.* at 15.

dissenters agreed that § 1988 and Title VII must be construed in the same manner. As Justice Brennan observed,

> *Carey* cannot be distinguished from the case before us. Section 1988 employs phraseology virtually identical to that used in the Title VII fee provision at issue in *Carey*, and the relevant Committee Reports underline Congress' intent to model § 1988 after the Title VII fee provision.

Id. at 20-21 (Brennan, J., dissenting) (footnotes omitted).

The *en banc* opinion thus contradicts the central message of *Crest Street*: the phrase, "action or proceeding," in a fee-shifting statute does not itself permit the conclusion that a person who prevails in an administrative proceeding may bring a court action for fees alone. Indeed, the approach taken in the *en banc* opinion is exactly the approach advocated by the dissenting opinion in *Crest Street*.

The *en banc* opinion's analysis of the language of the EHA, as amended by the HCPA, is flawed in other respects.

1. The opinion ignores Congress' frequent use of the terms "action" and "proceeding" in statutes to mean a judicial action or proceeding.[5]

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[5] *See, e.g.*, 28 U.S.C. § 1251 (conferring original but not exclusive jurisdiction on this Court in "actions or proceedings" involving ambassadors and other foreign officials); 28 U.S.C. § 1337 (conferring original jurisdiction on the United States district courts "of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies . . . ."); 28 U.S.C. § 1875(d)(2) (providing for attorneys' fees in "any action or proceeding" in which an employee proves that his employer has discriminated against him based on jury service even though the statute does not provide for any administrative proceeding by which an employee can vindicate his right). The use of both terms, action and proceeding, may reflect the distinction between law and equity that once played an important role in American jurisprudence, a practice that continues despite the virtual abolition of the distinction. *See* Fed. R. Civ. P. 2 ("There shall be one form of action to be known as 'civil action.' ").

2. The opinion is wrong in stating that elsewhere in the HCPA, Congress used language "identical" to that contained in the fee-shifting provision in order "to distinguish between the administrative and judicial phases of EHA litigation." App. 6a. On the contrary, even in the examples set forth in the opinion, Congress did not use the phrase, "proceeding brought under this subsection," but instead used the language, "administrative proceeding," to refer to an EHA administrative proceeding. Thus, as the *en banc* opinion itself notes, § 1415(e)(2), which authorizes a civil action by a party aggrieved, also states that "the court shall receive the records of the *administrative* proceedings . . . ." *See* App. 6a (emphasis added). By contrast, the fee-shifting provision, § 1415(e)(4)(B), does not state "any action or administrative proceeding." Furthermore, elsewhere in the HCPA, Congress used the word "proceeding" to refer to both judicial and administrative proceedings. In the "stay-put" provision, Congress specified that a school system may not unilaterally change the educational placement of a child "[d]uring the pendency of any *proceedings conducted pursuant to this section* . . . ." § 1415(e)(3) (emphasis added). The "proceedings" encompassed by the stay-put provision include not only administrative proceedings pursuant to § 1415(b)(2)&(c), but judicial proceedings pursuant to § 1415(e)(2) as well. *See Andersen v. District of Columbia*, 877 F.2d 1018 (D.C. Cir. 1989).

3. The opinion is wrong in concluding that Congress erred in enacting the term "subsection" in the fee-shifting provision, as well as in § 1415(f), which permits EHA litigants to pursue relief under other laws, but which also requires exhaustion of available EHA administrative remedies (§1415(b)(2)&(c)) before pursuing such relief. On the contrary, Congress did not carelessly err in selecting the language that it did; and § 1415(f) otherwise indicates that Congress did not authorize an independent fee action.

a. Subsection (e) of § 1415 plainly encompasses paragraph (2) of subsection (e), which authorizes only "ag-

grieved" parties to bring a civil action. Similarly, the reference contained in subsection 1415(f) to "subsections (b)(2) and (c) of this section" is also correct because paragraph (2) of subsection (b) is still part of subsection (b). It is entirely correct for Congress to use the term "subsection" when referring to a part of a designated subsection.

b. Subsection (f) of the HCPA permits parents to bring an action under § 1983 for a violation of the EHA, but it also provides that, if the relief sought is also available under the EHA, they must exhaust the EHA's administrative remedies. In a case seeking relief under § 1983, however, if a parent prevails in the administrative proceeding, *Crest Street* makes clear that no action for fees may be brought pursuant to § 1988. The fact that the other rights and remedies extended by § 1415(f) do not include an independent fee action for EHA violations suggests that the HCPA fee provision does not create such an action in an EHA case.

4. The opinion is wrong in stating that an independent fee action is necessary to make the offer-of-settlement provision meaningful.

a. The offer-of-settlement provision simply does not address the circumstances in which fees may be awarded but only those circumstances in which fees that *otherwise may be awarded to prevailing parents under the fee-shifting provision* may be denied. In context, § 1415(e)(4)(D) provides that, if parents reject a settlement offer, they may not recover attorneys' fees accrued thereafter if *the relief they ultimately obtain in court, in an action brought by an aggrieved party,* is not more favorable than the settlement offer. Conversely, if parents reject a settlement offer made before a due process hearing and prevail in that hearing, and there is no court litigation brought by an "aggrieved" party, the settlement provisions do not even come into play because no attorneys' fees may be awarded under the HCPA in the absence of litigation on the merits. Here, as in other fee-shifting statutes, the fact that the relief "finally" obtained may be obtained

in an administrative proceeding does not mean that Congress authorized an independent fee action.

b. Even without independent fee actions, hearing officers have a role to play in comparing settlement offers and the relief parents finally obtain. In the HCPA, Congress did not empower hearing officers to award fees. As a consequence, and in the context of the entire statutory scheme, it is plain that the hearing officer's role is limited. In a judicial proceeding involving a parent who has rejected a settlement offer and who prevails on the merits in that proceeding, the court may make the comparative assessment, or the court may remand the matter to the hearing officer and make its award of fees contingent upon a comparative analysis in that forum. Alternatively, a hearing officer may make a comparative evaluation when issuing his decision in the due process hearing, and this evaluation may be considered by the court if litigation on the merits ensues.

c. The timing provisions for settlement offers are also meaningful even if the HCPA does not authorize an independent fee action. Under the HCPA, a school system is permitted to make a settlement offer ten days before a due process hearing, ten days before a trial begins, and successive settlement offers. A school system thus may make an offer ten days before a due process hearing and, if the relief finally obtained by a parent is not more favorable than the offer, the parent — who must otherwise be in court on the merits — is precluded from obtaining *any* fees incurred *after the offer* even if the parent prevails in court.[6]

* * *

[6] Alternatively, if a school system makes a settlement offer fewer than ten days before a due process hearing but at least ten days before trial in accordance with Fed. R. Civ. P. 68, that offer cannot preclude fees incurred for the due process hearing but only fees incurred in connection with the judicial proceeding. Finally, a school system may make an offer before a due process hearing and a more favorable offer before trial; in those circumstances, whether, and to what extent, fees may be awarded may require two comparative analyses with the relief finally obtained.

In short, the EHA, even as amended by the HCPA, does not authorize actions for fees by parents who prevail in EHA due process hearings. On the contrary, under the EHA even as amended, only a party aggrieved by an administrative decision may file a court action. As a result, the HCPA permits parents to recover fees for a due process hearing only if they (1) must litigate the merits of an EHA claim in a court action brought by a party aggrieved by an administrative decision and (2) prevail in that action.

II. THE *EN BANC* COURT'S INTERPRETATION OF THE LEGISLATIVE HISTORY SQUARELY CONFLICTS WITH *CREST STREET* AND IS WRONG.

This Court has ruled that, when the language of a statute is clear, it must be followed unless the legislative history demonstrates "a clearly expressed legislative intention to the contrary . . .." *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (internal quotation marks omitted).[7] In *Crest Street*, in turn, this Court gave some indication of the showing that is required to overcome the statutory language when it ruled that the legislative history of § 1988 did not establish that Congress intended to permit an action for fees alone. In so ruling, this Court emphasized that: (1) "the Senate Report cited cases that involved at a minimum the filing of a judicial complaint" on the merits, as did the House Report; and (2) "the legislative history is replete with references to 'the enforcement of the civil rights statutes in suits, through the courts and by judicial process.' " *Crest Street*, *supra*, 479 U.S. at 12-13

[7] As Justice Marshall, writing for a unanimous Court, added, "[u]nless exceptional circumstances dictate otherwise, when we find the terms of a statute unambiguous, judicial inquiry is complete." *Id.* at 461 (internal quotation marks and brackets omitted). Here, given *Crest Street's* construction of the phrase "action or proceeding to enforce," and the HCPA's use of the term "action or proceeding," when considered in context ("brought under this subsection" and "aggrieved parties"), the language of the HCPA should be regarded as unambiguous.

quoting Webb, supra, 471 U.S. at 241 n.16 (other citations and internal quotation marks omitted).

Like the legislative history found insufficient in *Crest Street* to establish a Congressional intent to create an action for fees alone, the legislative history of the HCPA in the Senate is also insufficient. Thus, when the legislative history of the HCPA is carefully examined, it reflects that the Senate intended to provide fees for due process hearings only when a parent must go to court to enforce the educational rights guaranteed by the EHA. Furthermore, although the House may have intended independent fee actions, based on its belief that *Carey* had ruled that Title VII permitted such actions, its intention cannot be controlling. First, the House's overriding purpose was to create a right to fees in circumstances permitted by other fee-shifting statutes. Second, as this Court has ruled, " '[t]he content of the law must depend upon the intent of both Houses, not of just one.' " *Department of the Air Force v. Rose*, 425 U.S. 352, 366 (1976), quoting K. Davis. Administrative Law Treatise § 3A.31 at 175 (1970 Supp.).[8]

A. The Senate.

The Senate Report here is remarkably similar to the Senate Report analyzed in *Crest Street*.[9] The report cites two deci-

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[8] In *Rose*, this Court was presented with conflicting legislative history in the House and the Senate over the scope of an exemption to the FOIA. In view of the general rule of the FOIA favoring disclosure, it ruled that an exemption could be no broader than that agreed to by both Houses of Congress. Here, as Congress is well aware, the American Rule generally barring fee awards is the norm, and to create an exception to that rule, both Houses must agree.

[9] The parts of the Senate Report relied on in this petition are from the "additional views" parts of the report. The main body of the report addressed a far different bill that was not enacted; and there has been no disagreement in this case that the "additional views" are the sections of the report that address the bill that was enacted.

isions of this Court, *Carey* and *Webb*, and distinguishes between them on the grounds that *Carey*, brought under Title VII, involved mandatory administrative proceedings, while *Webb*, brought under § 1983, did not. Significantly, however, as in *Crest Street*, both cases cited involved court actions on the merits. Furthermore, the report elsewhere strongly suggests that fee-shifting is permitted only when court action on the merits is necessary: "handicapped children should be provided fee awards on a basis similar to other fee shifting statutes *when securing the rights guaranteed to them by the EHA.*" S. Rep. No. 99-112 at 14, reprinted in 1986 U.S. Code Cong. & Admin. News at 1804 (emphasis added).[10]

The legislative history in the Senate is otherwise replete with references to suits by parents to enforce the educational rights of their children. Thus, at the outset of the 99th Congress, when Senator Weicker, the architect of the HCPA, introduced S. 415, a bill containing language virtually identical to that of the fee-shifting provision eventually enacted, he stated:

> . . . [T]he legislation I am introducing today is a specific response to the court's opinion in Smith versus Robinson. My amendment to Public Law 94-142 is for *the limited purpose of clarifying what I believe has always been, and continues to be, the intent of Congress: that reasonable attorneys' fees be available to parents of handicapped children who prevail in a civil court action to enforce their child's right to an education.*

131 Cong. Rec. S1980 (Feb. 6. 1985) (emphasis added).

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[10] See also S. Rep. No. 99-112 at 17, reprinted in 1986 U.S. Code Cong. & Admin. News at 1806 (additional views of seven Senators describing the HCPA's fee-shifting provision as permitting attorneys' fees "in *cases brought to court on behalf of the educational rights of handicapped children*") (emphasis added).

S. 415 was approved by the Senate in July, 1985, after a brief discussion. Senator Weicker opened the discussion by summarizing *Smith v. Robinson* as holding "contrary to the original intent of Congress, that Public Law 94-142 does not allow the award of attorney's fees to *parents who*, after exhausting administrative procedures, *prevail in a civil court action to protect their child's right to a free appropriate public education.*" 131 Cong. Rec. S21389 (July 30, 1985) (emphasis added). He added:

> Allowing *courts* to award attorney's fees to *prevailing plaintiffs* is not an unusual congressional remedy. In fact, . . . Congress has already enacted more [than] 130 fee shifting statutes which provide for the award of attorneys fees to *parties who prevail in court to obtain what is guaranteed to them by law.*

Id. at S21390 (emphasis added). S. 415, Senator Weicker stated, "will restore to parents of handicapped children the right to be awarded attorney fees . . . *when they must go to court to secure the educational rights promised to them by Congress.*" *Id.* (Emphasis added). The statements of the co-sponsors of the bill, except for Senator Simon, do not differ in any important respect from those of Senator Weicker.[11]

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[11] Senator Stafford ("This bill amends Public Law 94-142 . . . to make reasonable attorney's fees available to parents who *prevail in court actions filed under 94-142.*") (S21390) (emphasis added); Senator Hatch (describing S. 415 as a response to the ruling in *Smith v. Robinson* that parents may not receive fees "when they prevail in an *EHA civil action*") (S21390) (emphasis added); Senator Kennedy (criticizing *Smith v. Robinson* for denying fees to "*parents* of handicapped children *who prevail in a court case under Public Law 94-142*" and noting that bill "will clarify congressional intent by authorizing the award of attorneys fees at the discretion of the judge to *prevailing parents in Public Law 94-142 cases*") (S21391) (emphasis added); Senator Kerry (describing fee-shifting provision as permitting "attorneys' fee awards *in cases brought to court on behalf of the educational rights* of handicapped children") (S21391) (emphasis added).

By contrast, Senator Simon was the only Senator to suggest that S. 415 permitted an award of fees "in any action or proceeding brought *under this subpart*" and the only Senator to mention *Carey*, including its *dictum* about separate fee actions. (S21392) (emphasis added).

The Senate bill differed from the House bill in a number of respects, thereby necessitating a conference. Following the conference in 1986, Senator Weicker reiterated his understanding of the bill: "What we do here today is to make the Education of the Handicapped Act consistent with more than 130 other fee shifting statutes which provide for the award of attorneys' fees to parties *who prevail in court to obtain what is guaranteed to them by law.*" 132 Cong. Rec. S16822 (July 17, 1986) (emphasis added). No other Senator contradicted this interpretation of the Act. Indeed, Senator Simon noted that the problem addressed by the legislation was that the EHA "does not allow the award of attorneys' fees to parents *who prevail in court actions to protect the right of their child to a free appropriate education.*" *Id.* at S16825 (emphasis added).

Accordingly, when the legislative history in the Senate is examined, it does not establish "a clearly expressed legislative intention" to permit an action for fees alone. *Burlington Northern R. Co*, *supra*, 481 U.S. at 461. Instead, it establishes that the Senate intended to make the HCPA like Congress' other fee-shifting legislation; and, as Senator Weicker, the architect of the HCPA, repeatedly affirmed, the legislation — like other fee-shifting statutes — would authorize fees when civil rights litigants must go to court to enforce their substantive rights. The other Senators who spoke (excepting Senator Simon in 1985) consistently with the *holding* of *Carey*, referred to fee awards to parents who must go to court to secure the rights afforded by the EHA. These repeated statements cannot reasonably be construed as merely one application of S. 415. No Senator, hearing or reading these statements, could reasonably have interpreted them as describing a measure that would permit fees, not only to parents who must go to court to secure their children's educational rights, but also to parents who need *not* go to court to do so.

B. The House.

In 1985, the House Report expressly adopted the *Carey dictum* that there could be an independent fee action and floor manager Williams defined "proceeding" in the fee-shifting provision in the House bill as meaning administrative proceeding. See App. 16a, 48a-49a, 50a. In 1986, moreover, after the conference, two opponents of an independent fee action stated that it had been authorized by the conference bill. See App. 54a. However, in the 1986 House floor debates, floor manager Williams did not confirm his 1985 interpretation of the legislation. Instead, he told his colleagues:

> The right to reimbursement of reasonable attorneys' fees provided for in the conference report is exactly the same right that Congress has extended to other persons protected by fees statutes — *no more and no less.*
>
> Thus, this conference report places handicapped children in the *same position* as others.

132 Cong. Rec. H17608 (July 24, 1986) (emphasis added). Furthermore, and in contrast to the 1985 House Report, floor manager Williams stated that "determinations as to whether a parent is awarded fees and the amount of the award are governed by applicable decisions interpreting 42 U.S.C. 1988." *Id.*

* * *

In short, the *en banc* opinion is wrong in concluding that the legislative history demonstrates that Congress intended an independent fee action. Insofar as the Senate is concerned, the opinion rests solely on an utterly unwarranted assumption that the reference in the Senate Report to *Carey* was necessarily an endorsement of its *dictum*, rather than its holding, and on a statement by Senator Simon in 1985; and it overlooks the otherwise overwhelming evidence, even from Senator Simon in 1986, that the Senate intended fee

awards to be made only when parents must go to court to vindicate the educational rights granted by the EHA. Insofar as the House is concerned, the *en banc* opinion overlooks the fact that its overriding purpose was to provide fee awards in the HCPA in circumstances permitted in other fee-shifting statutes.

III. OTHER CONSIDERATIONS.

There are two other reasons that support review of the *en banc* opinion here. First, although there is no conflict among the circuits over whether the HCPA creates an independent fee action, their rationales for carving out an unprecedented exception to the American Rule on fee awards are utterly at odds with each other and with this Court's canons of statutory construction. Second, in EHA cases not involving fee awards, the courts of appeals have squarely ruled that the EHA permits only a party aggrieved by a decision at the administrative level to bring a civil action. The existence of these conflicts is a further indication that review by this Court is necessary to ensure a correct and uniform construction of the EHA, as amended by the HCPA.

A. Other Fee Decisions.

Petitioners acknowledge that four other courts of appeals have ruled that the HCPA permits an independent action for fees. *See Eggers v. Bullitt County School District*, 854 F.2d 892 (6th Cir. 1988); *Duane M. v. Orleans Parish School Board*, 861 F.2d 115 (5th Cir. 1988); *Mitten v. Muscogee County School District*, 877 F.2d 932 (11th Cir. 1989), *cert. denied*, No. 89-905, 110 S. Ct. 1117 (1990); and *McSomebodies v. Burlingame Elementary School District*, 886 F.2d 1558 (9th Cir. 1989), together with *McSomebodies v. San Mateo City School District*, 886 F.2d 1559 (9th Cir. 1989), *as supplemented*, 897 F.2d 974 (1990).[12] Despite the unanimity of

[12] In addition, *Duane M.* was followed in *Shelly C. v. Venus Independent School District*, 878 F.2d 862 (5th Cir.1989), *cert. denied*, No. 89-788, 110 S. Ct. 729 (1990).

the result, the rationales of these courts are in conflict with each other and with this Court's pronouncements in important respects. The existence of these conflicts is strong proof that the now-uniform result is wrong.

Thus, in *Duane M.*, the Fifth Circuit, unlike the *en banc* opinion here, ruled that "[t]he HCPA does not expressly confer upon prevailing parties at the administrative level a right to bring a separate action solely in order to recover attorneys' fees . . .." 861 F.2d at 118. In addition, in *Eggers*, the Sixth Circuit suggested that the HCPA grants hearing officers the power to award attorneys' fees.[13] This interpretation of the HCPA is directly in conflict with the position taken by the *en banc* opinion here; it is also plainly wrong.

The opinions of other courts of appeals permitting an action for fees alone are flawed in other respects. Not only do they fail to examine carefully the language of the HCPA and ignore the teaching of *Crest Street*, but they also fail to recognize the independent significance of the Senate and the House and the substantial differences in the legislative history of the HCPA in the Senate and the House. As a consequence, these courts (except for the Fifth Circuit in *Duane M.*) have failed to understand that the HCPA does not expressly authorize court actions for fees alone; and they have placed undue weight on the evidence of legislative intent in the House in 1985.

In *Eggers*, for example, the Sixth Circuit, in construing the phrase, "action or proceeding," in the fee-shifting provision, relied heavily on *Carey's* emphasis on mandatory administrative proceedings. However, this Court declined

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[13] According to the Sixth Circuit, "the language of the Act permits the administrative officer to refuse to order an award of attorney's fees and we have difficulty grasping how one can refuse to award something he or she couldn't award in the first place." *Eggers*, *supra*, 854 F.2d at 895-96 (internal quotations omitted).

to base its ruling in *Crest Street* on this distinction.[14] In addition, the Sixth Circuit found *Carey's dictum* "persuasive" even though it recognized that this language was *dictum* and that this *dictum* had been disavowed by this Court in *Crest Street*. *Eggers*, *supra*, 854 F.2d at 895. Furthermore, although the Sixth Circuit noted that the HCPA permits a civil action to be brought only by a party aggrieved, it failed to analyze that provision and to recognize its significance. Finally, like the *en banc* opinion here, the Sixth Circuit, in analyzing the legislative history in the Senate, relied exclusively on Senator Simon's 1985 remarks about *Carey* and the comparison of *Carey* and *Webb* in the Senate Report. It thus failed to appreciate that the legislative history in the Senate — when examined in its entirety — demonstrates an intention to permit recovery of fees for administrative proceedings only when a parent is compelled to enforce EHA rights in court.

Duane M. is flawed in a different respect. Like the *en banc* opinion here, it reads into the offer-of-settlement provision of the HCPA an affirmative implication that is simply unwarranted. In the Fifth Circuit's view, the fact that attorneys' fees may be denied because parents reject a settlement offer before a due process hearing helps to establish that an action may be brought solely for the purpose of securing fees. *Duane M.*, *supra*, 861 F.2d at 119. This view is wrong. Thus, although parents who reject a pre-hearing settlement offer should be denied fees when the relief they finally obtain *in court* is no more favorable than the settlement offer, this fact does not establish their entitlement to fees for the administrative process when they need not go to court to secure their child's educational rights.

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[14] Indeed, as Justice Brennan observed in *Crest Street*, the result in *Crest Street* is not dependent on whether the administrative proceeding is "mandatory or optional, . . . integral or peripheral to an enforcement scheme." 479 U.S. at 22 (Brennan, J., dissenting).

The analyses in the other cases are even more wanting. In *Mitten*, the Eleventh Circuit simply asserted that "[t]he term 'action or proceeding' under the Act includes administrative hearings and appeals." 877 F.2d at 935. In addition, it erroneously refused to recognize that EHA administrative proceedings are brought under subsections (b) and (c) of § 1415, not subsection (e), and therefore wrongly concluded that the language of the fee-shifting provision, § 1415(e)(4)(B) — " 'any action or proceeding brought under this subsection' " — refers to administrative proceedings. *Id.* Finally, the *McSomebodies* cases contain no analysis whatsoever.

B. Other EHA Cases.

In EHA cases not involving attorneys' fees, courts have squarely ruled that EHA actions may be brought only by a "party aggrieved by the findings and decision" entered at the administrative level and that courts have jurisdiction only of an action brought by such an aggrieved party. Thus, in *Robinson v. Pinderhughes*, 810 F.2d 1270 (4th Cir. 1987), the court affirmed the dismissal of an EHA claim brought by the parents of a handicapped child who had prevailed in a due process hearing and who sought to compel the school system to comply with the decision. Despite the school system's noncompliance, the court ruled that "the plaintiffs had neither the responsibility nor the right to appeal the favorable decision by the local hearing officer since they were not aggrieved by his decision." *Id.* at 1272. Because the parents were "not parties aggrieved . . . the statute does not provide for their access to either the state or federal courts."[15] *Id.* at 1275. Other courts also have ruled that only

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[15] At the same time however, the court also ruled, pursuant to *Maine v. Thiboutot*, 448 U.S. 1 (1980), that the parents could pursue an enforcement action under § 1983 for vindication of the EHA's " 'enforceable substantive right to a free appropriate public education.' " *Id.* at 1274, quoting *Smith v. Robinson*, *supra*, 468 U.S. at 1010. In such an action, § 1988 is the provision governing an award of attorneys' fees.

parties aggrieved by administrative decisions may bring EHA actions in court. *See, e.g., Crocker v. Tennessee Secondary School Athletic Ass'n*, 873 F.2d 933, 935 (6th Cir. 1989) (where, despite *Eggers*, the court observed that "[o]nly parties 'aggrieved' by the results of the administrative process are granted a right of action in . . . court" and that it could "not imagine any other reading of the statute"); *Digre v. Roseville Schools Independent District No. 623*, 841 F.2d 245, 247, 249 (8th Cir. 1988) (same); *Antkowiak v. Ambach*, 838 F.2d 635, 641 (2d Cir.) (same), *cert. denied sub nom., Doe v. Sobol*, 488 U.S. 850 (1988).

The fact that the courts of appeals in non-fee cases interpret the language of the EHA, as amended by the the HCPA, to permit civil actions only by parties aggrieved by a decision at the administrative level suggests that the conflicting construction of the legislation in the fee cases is wrong. It also demonstrates the need for review by this Court to ensure a proper and uniform construction of this important legislation.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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